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July 25, 2016

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278

Dear Ms. Dortch:

On July 21, 2016, Mark W. Brennan and Wesley B. Platt, counsel to Navient Corp. ("Navient") met with Amy Bender, Legal Advisor to Federal Communications Commission ("Commission" or "FCC") Commissioner O'Rielly. At the meeting, we discussed the FCC's proposals for implementing Section 301 of the Bipartisan Budget Act of 2015,[1] which exempts calls to wireless numbers made "solely to collect a debt owed to or guaranteed by the United States" from the Telephone Consumer Protection Act's ("TCPA") technology-based "prior express consent" requirement.[2]

During the meeting, we discussed the ample evidence in the record that the NPRM's proposal to limit the number of calls allowed under the exemption to three per month is unduly restrictive and would conflict with many other regulatory requirements.[3] For example, as many commenters point out, the Department of Education ("Department") and other federal agencies ***require*** more than three calls per month to certain borrowers.[4] We accordingly agree with the

[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 31 FCC Rcd 5134 (2016) ("NPRM"); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(2)(H), 129 Stat. 584 (2015).

[2] *See* 47 U.S.C. § 227(b)(1). All of the comments and reply comments referenced in this letter were filed in CG Docket No. 02-278 in June 2016.

[3] *See, e.g.*, Navient Comments at vii, 41-15; Navient Reply Comments at iv, 4-7; Am. Assoc. of Comm. Colleges Comments at 2 ("[T]hree call attempts per month is not sufficient to assist borrowers.").

[4] *See, e.g.*, Am. Bankers Ass'n and Consumer Bankers Ass'n Comments at 11; Consumer Mortgage Coalition Comments at 5-10; *see also* Letter from Mark W. Brennan, Counsel, Navient, to Marlene H. Dortch, Secretary, FCC, CG Docket No-02-278, App. A (June 30, 2016) (providing an overview of federal and state government regulations that require calls to borrowers and have been cited by commenters in this proceeding).

Consumer Financial Protection Bureau ("CFPB") that a "careful assessment" is needed to determine an optimal limit on the number of calls allowed under the exemption.[5] We also agree with the Department that the NPRM's proposed limit of three calls per month "would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default, especially given that the proposal limits the number of initiated calls, even if the calls go unanswered."[6]

Based on the record, the Commission should consider adopting a limit of three calls per week. Parties have expressed a range of views on this issue,[7] and a three-call-per-week limit represents a reasonable compromise that appropriately balances the varying interests in this proceeding. Such a limit is also supported by data in the record. For example, we explained in our comments that 25 percent of federal student loan borrowers require 40 or more call attempts to reach,[8] and Nelnet showed that calling up to ten times per month leads to 42 percent more live contacts compared to calling three times per month.[9] Meanwhile, the National Council of Higher Education Resources' recent survey demonstrates that traditional methods of contact – landline calls and traditional mail – are not effective means of communicating with the most at-risk federal student loan borrowers.[10] Moreover, a limit of three calls per week would give callers the flexibility they need to comply with other federal agencies' requirements. And this limit is consistent with proposals from consumer organizations, such as the National Consumer Law Center ("NCLC"), in the CFPB's debt collection proceeding.[11] On the other hand, **the record contains no data or rational basis to support a three-calls-per-month limit.**

In addition, there is near-universal agreement on several key issues in this proceeding. For example, nearly all commenters support the NPRM's proposal to interpret the exemption to cover debt servicing calls.[12] Such calls are critical to keeping student loan borrowers on track and aware of their repayment options.[13] Often, they are a vital pathway for providing information to an at-risk or struggling borrower.[14] Moreover, because the calls that federal student loan servicers place are not marketing calls, interpreting the exemption to include servicing calls will not cause consumers to receive unwanted telemarketing calls. In addition, the FCC's own data reinforces the fact that student loan servicing calls are not the issue driving TCPA complaints,[15]

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[5] *See* CFPB Comments at 10.

[6] *See* Letter from Ted Mitchell, Undersecretary, the Department, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (July 11, 2016).

[7] *Compare, e.g.*, NCLC Comments at 24-27 (supporting a limit of three calls per month), *with* Education Finance Council Comments at 7-8 (proposing a limit of three call attempts per day or nine call attempts per seven-day period).

[8] *See* Navient Comments at 42-43.

[9] *See* Nelnet Comments at 14.

[10] See Letter from James P. Bergeron, President, National Council of Higher Education Resources ("NCHER"), to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 16-18 (July 11, 2016).

[11] April Kuehnhoff and Margot Saunders, NCLC*, Debt Collection Communications: Protecting Consumers in the Digital Age* at 4 (June 2015), *available at* http://bit.ly/1LQxpDK.

[12] *See* NPRM ¶¶ 8-10; *see also, e.g*., NCHER Comments at 4-5; Educ. Credit Management Corp. Comments at 3-5; Credit Union Ass'n of the Dakotas Comments at 3.

[13] *See id.*

[14] *See* Educ. Finance Council Comments at 1.

[15] Based on available FCC data, fewer than 400 consumer complaints out of the almost 350,000 phone complaints lodged with the FCC between October 31, 2014 and May 2016 were related to a call from

and the exemption applies to only a small fraction of student loan servicing calls – for example, Navient already has consent to autodial nine out of 10 of the federal student loan borrowers whose loans we service.[16]

The vast majority of commenters also agree that the exemption should cover calls prior to delinquency. State agencies,[17] nonprofit organizations,[18] education associations,[19] and student loan servicers[20] all agree that the exemption properly includes such calls. As many commenters emphasize, the exemption applies based on the purpose of the calls, not the level of delinquency.[21] Moreover, such calls can be instrumental in helping student loan borrowers avoid delinquency – as highlighted by the Department's federal student loan requirements and the Interagency Task Force's recommendations to President Obama last year.[22] NCLC *et al.* also note that they have "been persuaded" since the NPRM's release that the exemption should cover certain pre-delinquency calls.[23]

Likewise, many commenters agree that the exemption should cover calls to numbers other than those provided by borrowers, as reflected by the comments of the Association of Community College Trustees,[24] the National Association of College and University Business Officers,[25] ACA International,[26] NCLC,[27] and the Student Loan Servicing Alliance.[28] Such calls are made "solely to collect" a federal debt. Additionally, they are often a critical tool for locating federal student loan borrowers.[29] In some cases, the Department's rules even require skip-tracing and contacting individuals other than the borrower.[30]

Navient. Considering that Navient represents almost 25 percent of the student loan servicing market, this data suggests that calls regarding federal student loans are not behind the hundreds of thousands of TCPA complaints that the FCC receives each year. *See* Navient Comments at 13.

[16] Navient Comments at v. Borrowers who can be called on their cell phones are far more likely to be current. Although 93 percent of Navient's up-to-date federal student loan borrowers are "dialable," only 57 percent of borrowers who end up defaulting fall into this category. *Id*. at 12.

[17] *See, e.g.,* Utah Higher Educ. Reply Comments at 1.

[18] *See, e.g.,* United Negro College Fund ("UNCF") Comments at 2 ("[W]e recommend that the [FCC] permit the use of auto dialer technology to be used by loan servicers to contact borrowers to advise them of their repayment options, even if their loans are in good repayment status."); Vermont Student Assistance Corp. Reply Comments at 1.

[19] *See, e.g.,* Am. Ass'n of Community Colleges Comments at 2.

[20] *See, e.g.*, Navient Comments at 30-35; Continental Service Group d/b/a ConServe Comments at 4-5 ("ConServe Comments").

[21] *See, e.g.*, Navient Comments at vi, 37, 40; ConServe Comments at 5-6.

[22] *See, e.g.*, Navient Comments at 31-32; 34 C.F.R. § 682.411; U.S. Dep't of Educ., *Recommendations on Best Practices in Performance-Based Contracting* at 10 (2015), https://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf.

[23] *See* NCLC Reply Comments at 6-7.

[24] *See* Ass'n of Community College Trustees Reply Comments at 4.

[25] *See* Nat'l Ass'n of College and University Business Officers Reply Comments at 4.

[26] *See* ACA Int'l Comments at 11.

[27] *See* NCLC Reply Comments at 9.

[28] *See* Student Loan Servicing Alliance Comments at 20.

[29] *See, e.g.*, Navient Reply Comments at 23.

[30] *See* 34 C.F.R. § 682.411(h), (m).

Additionally, we discussed the impact of the Commission's recent clarification regarding calls by or on behalf of the federal government.[31] This clarification supports the position that federal agencies like the Department and contractors who are their agents (and act within the scope of their agency under the common law principles) are not "persons" under the TCPA or otherwise subject to its requirements.[32] As the Commission explained, "the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government's instructions."[33] For example, a court would likely find that the Department's Direct Loan Program servicers act as its agents in a number of circumstances.[34]

The FCC's clarification is also consistent with its efforts to adopt limits in this proceeding. Specifically, the clarification applies based on the relationship between the caller and the federal government, whereas the federal debts exemption applies based on the purpose of the call. A party that places a call to collect a debt "owed to or guaranteed by" the federal government may or may not be a contractor for the federal government (and, even if the party is a contractor, it may not be acting within the scope of an agency relationship with the federal government).[35]

The Supreme Court's decision in *Campbell-Ewald Co. v. Gomez* supports this position. There, the Supreme Court confirmed ***after*** Congress adopted the Bipartisan Budget Act that federal agencies enjoy sovereign immunity and that their contractors "obtain certain immunity in connection with work they do pursuant to their contractual undertakings with the United States" when they "perform[] as directed."[36] As we explained in our comments, the rules adopted in this proceeding can recognize this basic framework, but they cannot disturb it.

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

/s/ Mark W. Brennan
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cc: Amy Bender

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[31] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al*., Declaratory Ruling, FCC 16-72 (rel. July 5, 2016); *see also* 47 U.S.C. § 227(b)(1).

[32] *See id*.

[33] *Id*. ¶ 11.

[34] Whether an agency relationship in fact exists between the Department and Direct Loan Program servicers is a matter to be determined by common law principles of agency. *See, e.g., id*. ¶¶ 16-17; *see also Dish Network, LLC v. FCC*, 552 Fed.Appx. 1 (D.C. Cir. 2014).

[35] *Id*. ¶¶ 1, 11.

[36] *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (2016).